

June 30, 2017

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C., 20554

Re: Comments on Notice of Proposed Rulemaking and Notice of Inquiry Regarding Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17–59; FCC 17–24.

Introduction

The Electronic Transactions Association (“ETA”) submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rule Making (“NPRM”) and Notice of Inquiry (“NOI”) regarding Advanced Methods to Target and Eliminate Unlawful Robocalls.

ETA is the leading trade association for the payments industry, representing over 500 companies worldwide involved in electronic transaction processing products and services. ETA’s membership spans the breadth of the payments industry to include independent sales organizations, payments networks, financial institutions, transaction processors, mobile payments products and services, payments technologies, and software providers and hardware suppliers. ETA member companies touch, enrich and improve the lives of every consumer by making the global flow of commerce possible.

The Telephone Consumer Protection Act (“TCPA”) was enacted by Congress in 1991 as a way to combat unsolicited telemarketing calls to residential lines. Over twenty-six years later, a lot has changed with regard to technology, including the way businesses communicate with their existing customers, and the expectations of consumers in general for how they receive information. However, as the FCC and Chairman Pai have acknowledged and was reported in the Industry Robocall Strike Force 2016 Report (“Strike Force Report”), despite two federal laws governing how businesses communicate with consumers, illegal or unwanted robocalls are at their highest point, with over 2.4 billion received nationwide each month.¹ The staggering number of illegal calls made each month demonstrates that such calls pose a threat not only to consumer privacy, but also to legitimate communications between businesses and their existing customers. It is highly likely that illegal robocall attempts are drowning out attempts by legitimate businesses to deliver important information to their existing customers over the phone or through other regulated mediums. This, in turn, harms consumers by preventing them from receiving information that they

¹ Robocall Strike Force, Robocall Strike Force Report at 1 (2016), <https://transition.fcc.gov/cgb/Robocall-StrikeForce-Final-Report.pdf> (Strike Force Report).

deserve and expect to receive from the companies with whom they have an established business relationship.

ETA applauds and supports the Commission's efforts to combat illegal robocalls, but notes that it is important that as the FCC continues to pursue consumer protection, it recognize the difference between actual unwanted telemarketing calls where an unknown merchant is attempting to sell to a consumer, and purely informational calls involving communication between businesses and their existing customers.

This distinction is important because ETA companies are not telemarketers; they are financial services companies who have (or service) a business relationship with a customer. ETA companies either have a direct relationship with an individual consumer, or communicate with existing customers on behalf of financial institutions with which they are associated.

ETA member companies seek to communicate with consumers to prevent fraudulent use of their accounts by criminals. Specifically, our members have developed real-time communications tools that empower consumers to instantly identify fraudulent transactions via mobile device, an important step in curtailing multi-billion-dollar annual fraud activity in the U.S. When an ETA member company identifies suspicious activity on a customer's account, a text message or mobile call to the account holder to verify activity allows the consumer to quickly freeze an account and stop further fraudulent activity. Because the consumer has zero liability for such fraud, quick communication is crucial to stopping criminal activity that could impose significant costs on merchants. It is important as new technologies develop, financial institutions have the flexibility to contact their customers quickly to alert them to potential fraud.

ETA acknowledges and appreciates the Commission's step, through its 2015 Declaratory Ruling and Order, to provide protections for financial services institutions who contact their customers in instances of fraud. However, this provision is subject to the same challenges as the rest of the law with regard to keeping pace with rapid changes in technology and threats from bad actors. ETA looks forward to working together with the new Commission to strengthen provisions related to fraud alerts to provide more clarity for businesses and certainty for consumers to receive information in the most efficient means.

In the NPRM, the Commission tentatively defines "illegal" robocall as "one that violates the requirements of the Telephone Consumer Protection Act of 1991, the related FCC regulations implementing the Act, or the [FTC's] Telemarketing Sales Rule" as well as state and federal laws prohibiting telemarketing fraud.² Unfortunately, because of ambiguity in the TCPA, it is difficult to precisely determine what is, and what is not, an "illegal" robocall in each and every circumstance. This oftentimes results in ETA member companies faced with an unfortunate choice of contacting their existing customers with critical, time-sensitive account information and potentially violating the TCPA, or simply forgoing timely communication with their customers altogether to ensure they are not found in violation of the law.

² Advanced Methods To Target and Eliminate Unlawful Robocalls, 82 Fed. Reg. 22625 (proposed May 17, 2017).

In order to better facilitate consumer protection, the TCPA should be clarified and strengthened so that businesses can feel confident that important, time-sensitive communication with their customers will be permissible and not in violation of the TCPA.

As outlined in the comments below, ETA respectfully suggests that the following areas under the TCPA be strengthened and clarified in order to provide greater certainty to consumers and businesses alike:

- 1) Allow flexibility for businesses when a customer's number has been reassigned;
- 2) Clarify the definition of revocation of consent; and
- 3) Revise the definition of Automatic Telephone Dialing System (ATDS)

General Comments

The first step in curbing illegal and unwanted telemarketing calls is to stop the calls at their source. The FCC in this NPRM considers call-blocking technology and procedures as a way to achieve this first step. The NPRM gives telephone network providers clarification of rules following the "Strike Force Report" and the FCC's 2016 Public Notice³ to block calls that fit within a particular set of criteria including unassigned numbers defined as: 1) numbers that are invalid; 2) numbers that are valid but not yet allocated to a provider; and 3) numbers that are allocated to providers but not yet assigned to subscribers. ETA supports these clarifications provided by the Strike Force Report but wishes to acknowledge that challenges remain in the quest to eliminate illegal calls.

In discussion and consideration of call-blocking and other methods to reduce or eliminate illegal robocalls, it is important to distinguish between illegal telemarketing calls, and calls made by legitimate businesses to their existing customers. The FCC should focus resources on preventing bad actors who intentionally break or ignore the law, and help protect law-abiding businesses who are communicating with their existing customers. Technology is dynamic and changing rapidly, and we recognize that tools are available for both telephone network providers and individual consumers to filter what calls are received. As will be further discussed in the comments offered below, as popularity for either provider-initiated, or third-party, consumer opt-in call-blocking grows, proper protocols such as industry best-practices and cooperation with federal regulators should be in place as to ensure any necessary mechanism for legitimate businesses to remedy an error in call-blocking.

Recognizing the important efforts of this NPRM and the broader threshold issues it implicates, ETA believes that the Commission should take this opportunity to strengthen the TCPA and provide clarity to consumers and businesses on those issues. ETA submits that this is critical to achieving the goal of protecting consumers from bad actors while allowing uninterrupted, desired

³ *Consumer and Governmental Affairs Bureau Clarification on Blocking Unwanted Robocalls, Public Notice*, 31 FCC Rcd 10961 (CGB 2016) (2016 Guidance PN).

communication from businesses with which they have existing relationships. ETA believes there are three key areas that if strengthened and clarified, will help achieve this goal.

1) Allow flexibility for businesses when a customer's number has been reassigned

A reassigned phone number refers to a number once belonging to, or assigned to, a person's cell phone, and then that same number being reassigned to a different person. This can occur in a number of different circumstances; one example is if a person changes cell phone service providers. Reassigned numbers occur frequently – there are at least 37 million reassigned phone numbers each year.⁴

Reassigned numbers are problematic for businesses because currently the TCPA allows for just one attempt at contacting the intended recipient before the business is found to be in violation of the law. Given that this provision has strict-liability, the consequences are significant. The intent of the provision was to reduce or eliminate calls from telemarketing companies to incorrect recipients, however, it is affecting businesses who believe they are contacting their existing customers but may not know their customer's number has been reassigned.

The strict-liability provision is problematic for businesses because of how the FCC interprets a call-attempt.⁵ The call does not have to connect to a live person, and the law applies even if the company is unaware the number has been reassigned. As a hypothetical: A business may believe it is placing a valid call to one of its existing customers on a phone number that was provided by that customer. The customer does not answer the phone and the company reaches the voicemail box for the number dialed, but the voicemail does not identify by name the owner of the phone number (rather it uses the default, machine-spoken phone number). The strict-liability provision would apply in this case, despite the company not being made aware the number called no longer belonged, or never belonged, to the intended recipient.

While the law imposes a strict-liability for the caller, there is no obligation of the incorrectly called party to report an "unintended call." Therefore, a business can continue attempting to call someone who it believes is its existing customer on the customer-provided number without any notification that the number no longer belongs to its customer. Then the person who received the unintended calls can sue the business for high-dollar damages due to the private right of action in the law.

⁴ Alyssa Abkowitz, "Wrong Number? Blame Companies' Recycling," *The Wall Street Journal* (Dec. 1, 2011), available at <http://on.wsj.com/1Txmowl>.

⁵ *Id.*

With over 37 million telephone numbers reassigned each year and statutory damages ranging from \$500 to \$1,500 per call – the financial penalty for businesses acting in good faith can be substantial.⁶

It is important that the FCC consider these realities and address the problems caused by reassigned numbers in order to protect those businesses acting in good faith to contact their customers.

2) Clarify definition of revocation of consent

The FCC’s 2015 Omnibus TCPA Ruling and Order⁷ interpretation of the phrase “revocation of consent” states that at any time, “a customer can revoke, by any reasonable means, his prior express consent to contact him.” Upon receipt of revocation of consent, a business must cease contact with the customer, or potentially be subject to a fine, lawsuit, or both.

The term, “by any reasonable means” is ambiguous because it fails to capture the myriad of ways customers interact with businesses, including the increase in avenues created by technology. ETA member companies and other legitimate businesses want to follow the law, and it is in the best interest for businesses to respond to customer feedback. Unfortunately, without clarity in the definition of revocation of consent, businesses must try and capture possible revocation in an almost unlimited number of ways.

For example, a customer of a bank may walk into a branch of the bank and say to a bank teller that she does not wish to be contacted any longer. There are a number of ways this request could reasonably be interpreted yet not accurately be fulfilled.

Then Commissioner, now Chairman Pai offered a creative analogy that illustrated how the FCC’s 2015 interpretation of revocation of consent simply would not benefit the consumer or business when he said, “could a customer simply walk up to a McDonald’s counter, provide his contact information and a summary ‘I’m not lovin’ it,’ and put the onus on the company? The prospects make one grimace.”⁸

There have been incredible advancements in technology since TCPA enactment, including many more possible mediums to contact customers. In 1991, cell phones were hardly

⁶ 47 U.S.C. §§ 227(b)(3), 227(c)(5), 227(g), 503(b).

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, 30 FCC Rcd. 7961 (2015).

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, 30 FCC Rcd. 7961 (2015).

commonplace, text messages certainly did not exist, email-use was still a new concept as the Internet was in its infancy, and no one could imagine today's smartphone with an app for just about everything.

Today, consumers are demanding real-time information about their accounts and transactions that is clear, transparent, and communicated to them utilizing today's communication technology (e.g. smart-phones, tablets, etc.). Fraud alerts, transaction confirmations and other notices should be provided in real-time via text, SMS, or in-app communications if that is how the consumer accesses and uses the service.

Conversely, the revocation of consent should also align with how consumers use communication technology. For example, if the customer walks into the bank branch and verbally tells a teller she wishes to no longer be contacted, how can the bank be sure what she really means? Do we remove her from all types of communications, or just phone calls and to what device – their mobile device or their landline telephone? What about important text message alerts, app notifications, and emails that she may wish to receive?

With an ambiguous revocation of consent definition, true consumer protection is at risk. While it is important to protect consumers from abusive practices, it is equally as important to provide vital, time sensitive information to consumers regarding their personal accounts. A blanket revocation could jeopardize the information flow from businesses to their customers regarding this sensitive information. It is important that the FCC clarify this standard for revocation of consent, which impacts whether a robocall is illegal or not, so that businesses feel confident in contacting their customers in mediums that the customer prefers.

3) Revise definition of Automatic Telephone Dialing System (ATDS)

The TCPA prohibits calls from an ATDS, defined as a piece of “equipment which has the capacity to store or produce phone telephone numbers to be called, using a random or sequential number generator; and to dial such numbers”⁹, without the requisite consent.

The original intent of this definition was to address the method in which unwanted telemarketing calls were being placed. A novel technology in 1991, what the FCC defined as an ATDS was a machine that would either randomly or sequentially dial a number, in order to reach the highest likely number of consumers.

The challenge has been that, as technology has evolved, the 1991 definition has not, leading to the result where a simple smart phone could be considered an ATDS. Rather than prohibiting particular types of technology used to reach consumers, the FCC should focus on determining whether or not the customer wished to be contacted or there is a business

⁹ 47 U.S.C. §§ 227(b)(3), 227(c)(5), 227(g), 503(b).

relationship with their customers and legitimate purpose for the call – e.g. delivery of time-sensitive information related to their financial accounts.

Use of technology to reach customers as quickly as possible with important information regarding their accounts, should be promoted, not prohibited. Under the current rules, calls placed via an ATDS could be subject to violation under the TCPA. Manually dialing each customer is simply not a solution, as it essentially eliminates the ability of businesses to communicate with their existing customers in a timely manner since it is not feasible for an individual to dial hundreds or even tens of thousands of phone numbers. Logically, in order to achieve the same rate of dialing via a machine, a business would need to install separate landlines and hire additional humans to dial their existing customers' numbers. Aside from the inefficiency this scenario creates, the increased cost of compliance, due to the cost of hiring more employees to simply dial phone numbers, denies companies the ability to reinvest more of their valuable resources to benefit their customers and the larger economy.

Comments in Response to Specific Questions

1. Should the FCC allow provider-initiated blocking if the call originates from an unassigned number (defined under three categories: 1) numbers that are invalid; 2) numbers that are valid but not yet allocated to a provider; 3) numbers that are allocated to providers but not yet assigned to subscribers)?

ETA believes the recommendation included in the 2016 Strike Force Report of provider initiated call blocking if the call originates from an unassigned number (defined by three categories: 1) numbers that are invalid; 2) numbers that are valid but not yet allocated to a provider; 3) numbers that are allocated to providers but not yet assigned to subscribers) provides an appropriate criterion for which providers can initiate call-blocking.

The explanation included in the FCC's NPRM for consideration of the criterion is thoughtful and thorough, and provides a substantial first defense for illegal robocalls to consumers.

2. Should the FCC establish a challenge mechanism for callers who were blocked in error?

ETA believes that it is important for the FCC to facilitate a favorable environment for industry to work together to combat illegal robocalls and protect consumers while simultaneously protecting legitimate business-customer communications. Some of the tools to achieve these dual goals may include either call-blocking or "white-listing" of calls. In instances where legitimate callers and businesses have their numbers incorrectly blocked, it is important for there to be a formal mechanism for legitimate businesses to challenge the blocked call and that such a challenge be resolved expeditiously. It would be appropriate for the FCC to establish a challenge mechanism.

3. Should the FCC implement a formal process to allow legitimate callers to notify providers when their calls are blocked in error, and require the providers to immediately cease call-blocking to that number?

As mentioned previously, it is important for legitimate callers to have a mechanism to challenge their calls blocked in error. Additionally, ETA believes that swift resolution is important in an effort to minimize disruption of communication between legitimate businesses and their customers. When developing the resolution process, the FCC should consider the provider process and ability to “immediately cease” call-blocking. While swift-resolution is important, so is protecting providers that are responding to feedback from both the call recipients and those who place the calls.

4. How can the FCC facilitate information sharing so that the challenge of the blocked call reaches the provider responsible for the call-blocking?

ETA believes that strong self-regulation is an effective tool to provide a valuable service to consumers. Indeed, the PCI standards, which are used by participants in the payments ecosystem are a good example of effective industry self-regulation. However, the FCC can play a valuable role in the facilitation of communication between the parties involved in call placement, connection, and completion or blocking.

Removing any roadblocks in federal regulations and developing a streamlined process for challenged calls is a vital step in removing friction in communication between providers and businesses.

5. Should the FCC designate an officer or other point of contact for legitimate callers to either “white-list” their number or challenge improper blocking of their calls?

As discussed, ETA believes that it is important for the FCC to facilitate a favorable environment for industry to work together to combat illegal robocalls and protect consumers. It is important for there to be a mechanism or intermediary to monitor any improper blocking of calls, or to challenge if a call from a legitimate business is blocked in error. While ETA supports the concept of a self-regulated industry, it recognizes the importance of having an intermediary to resolve any disputes, whether intentional or not. In the instance where a dispute needs to be resolved, having a designated point-of-contact at the FCC would be an appropriate and helpful avenue through which businesses and providers can communicate.

Conclusion

The TCPA is important to help protect consumers from unwanted and illegal telemarketing laws. Unfortunately, the TCPA has expanded in scope without an appreciation for advancements in technology or social trends. This expansion has interfered with legitimate communication between businesses and their existing customers- which was not the original goal of the TCPA.

ETA member companies are not telemarketers; they are financial services companies who have a business relationship with their customers. The information ETA companies communicate to their customers is related to customer financial accounts and oftentimes time-sensitive. The TCPA should allow for these important business-customer communications.

In order to facilitate consumer protection and protect legitimate business-customer communication, the TCPA should be clarified and strengthened so that businesses and their customers can feel confident that important, time-sensitive communication will be permissible and not in violation of the TCPA.

ETA supports the efforts of the current FCC to target the source of unwanted and unsolicited telemarketing calls to consumers. ETA looks forward to working with the FCC to further strengthen the TCPA so that consumers get the information they want and deserve from the companies with which they do business.

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We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me or Scott Talbott, SVP of Government Affairs at ETA, at Stalbott@electran.org.

Respectfully submitted,



Rebecca A. Cantrell
Senior Manager of Government Affairs
The Electronic Transactions Association
1620 L Street NW, Suite 1020
Washington, D.C. 20036
(202) 677-7418